IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OPPOSING MOTIONS TO AFFIRM

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Waving the banner of "fragmentation and dilution" amid gratuitous racial characterizations,[1] appellees

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[1] *E.g.*, Motion to Affirm by Private Appellees 2-3 ("all white county government" engaged in "repeated racial gerrymandering"). Having successfully blocked elections in 1976, private appellees' detailed exploitation of the facts in an attempt to impute illicit motivation falls short of the mark. Specifically, there is nothing in this record which would indicate anything other than a tedious, long drawn out process in which appellants' attempts to comply with *Beer* have been rejected on the basis of alleged fragmentation and dilution, *i.e.*, failure to concentrate black voters.

take an intellectual quantum leap in asserting that the 60/65% rule[2] is a reasoned application of *Beer* v. *United States*, 425 U.S. 130 (1976). As now articulated, the phrase "effective exercise of the electoral franchise" as used in *Beer* equates with a predetermined percentage level which will give blacks an "equal chance" (obviously more than "some possibility")[3] to elect candidates of their choice. Thus, now armed with the lower court's construction of § 5, staff attorneys and subprofessionals employed by the Voting Rights

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[2] Private appellees assert, *id.* at 18, that appellants' expert agrees with the 65% breakoff. The portion of the deposition cited, however, relates to the *fact* that on the basis of past performance, if private appellee Eddie Thomas ran for office again, he would indeed require a 65% district in order to be elected. Subsequently, even this concession proved erroneous. In the special election conducted on Dec. 11, 1979, Mr. Thomas ran in District 3 which was computed to have a 67% black population and a 64.5% black VAP. Jurisdictional Statement App. E at 27a. In his race against a white candidate Mr. Thomas received only 765 votes to his opponent's 991.

Mr. Thomas' propensity to become the Harold Stassen of Warren County bears no relationship to candidates from the black community capable of mustering broad-based support. Compare Melvin Redmond dep. at 4, 13-15 (testimony of black city councilman detailing election in which whites worked actively in his campaign). Finally, the Government's assertion that appellants do not contest the validity of the 60/65% rule is frivolous. *Compare* Motion of the United States to Affirm 8 n.5 *with* Jurisdictional Statement 14 n.17. See also Rule 15(c) (questions fairly comprised in Jurisdictional Statement will be considered).

[3] See Motion of the United States to Affirm 9 n.6 (articulating the distinction for purposes of justifying position taken in United States v. Mississippi, Doc. No. 79-504. The approach advocated in the latter case is, of course, based on the recent election of Melvin Redmond. See note 2, *supra*. The unanswered question: Why isn't this approach also applicable to county redistricting?

Section are authorized to review submissions in a metaphysical environment which includes the assessment of

> such matters as the history of political participation by blacks . . . the effects of past discrimination, the results in county elections, and the relative rates of voter registration and voter turnout for blacks and whites. In this way [the Attorney General is] able to assess the effect of [a] proposed plan on the *effective exercise* by blacks of their franchise.[4]

Having performed a "dry run" on Warren County, how this works in fact is easily described. First, the Department rejects a submission on the basis that the required number of 60/65% districts are not in the proposal.[5] Second, the reasons given for rejection incorporate alleged transgressions of both the "effect" and "purpose" proscriptions of § 5. With respect to the former, if there are districts beneath the required level the "effect" of the proposal is necessarily to diffuse what the Department has determined to be "effective" exercise of the franchise.[6] With respect to the latter,

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[4] Motion of the United States to Affirm 11.

[5] Laying aside the Government's assertion that the meaning of "effective" exercise will vary from case to case, *id.* at 10, past performance does not indicate a (lady or the tiger) scenario. As may be derived from *UJO*, United States v. Mississippi, and the instant case, the 65% dragon is not a myth, *i.e.*, it is firmly ingrained into Department personnel that this level, and *only this level*, is sufficient to offer an "opportunity" for blacks to elect a candidate of their choice regardless of the jurisdiction involved. Moreover, the interesting suggestion that the percentage level will vary leaves yet another crucial question unanswered: How are professionals employed to design redistricting plans to secure the information necessary *vis-a-vis* the magical level?

[6] As did the Department, private appellees also suggested "alternatives" to the submission in question. The "non-dilution"

since *Beer* requires that racial characteristics of a population be taken into consideration (in order that retrogression does not occur), lines knowingly drawn in a manner which invade black population concentrations in a format producing districts beneath the required population/VAP level must necessarily be drawn with a discriminatory purpose.[7] Finally, presuming utilization of the declaratory judgment procedure, department personnel then employ an *after the fact* scenario, *i.e.*, gathering data concerning low black registration, socio-economic status, past failures to elect candidates, bloc voting and the like[8] which—as defined by the lower court—are sufficient to justify the 60/65% level.

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argument is best described by Mr. Henry Kirksey, an advocate planner employed by this group:

> Q. . . . But when you did this [draft], part of your objective was to maximize black voting strength in that area.
>
> A. *To minimize the dilution.*
>
> Q. But, in turn, *to increase as much as possible black voting strength.*
>
> A. *Yeah, to prevent . . . fractionalization of the black voting strength.*
>
> . . . .
>
> Q. You, in essence have concentrated black voting strength, correct?
>
> A. What I have done is minimize the dilution of black voting strength. [Kirksey dep. at 94, 104 (Emphasis added.)]

[7] As previously noted, shape is irrelevant. See Jurisdictional Statement, Map 4 (Department of Justice alternative).

[8] A relatively easy chore compared with definitive evidence which must be amassed in a voter-dilution case. The reason for a dearth of findings in the instant case as compared say, to those in Bolden v. City of Mobile, Doc. No. 77-1844, is the *fact* that—after 1,800 pages of depositions—appellees have been unable to develop the type and quality of evidence needed to substantiate findings of that caliber. Indeed, appellants approached the entire discovery process with a singular purpose of developing evidence for the successful defense of a voter-dilution case they were cer-

The Solicitor General next postulates the "fragmentation and dilution" argument in the context of discriminatory effect and/or purpose because: (1) appellants "failed to justify" [9] the plan's shape; and (2) "failed to show that there were no alternatives" [10] that would achieve the equalization objective without "severely fragmenting" [11] black population concentrations. The process utilized in developing the plan has been described.[12] The total refusal by appellees in their briefs to deal with the realities of what actually occurred requires that it be repeated here.

There is *no dispute* that, other than issuing instructions that dual incumbancy not occur, appellants' only stated objective was the development of a plan that would be acceptable under § 5 and equalize, as much as possible, road and bridge-maintenance responsibilities. CPI, acting on the advice of counsel to produce two substantial black districts, divided up the rural areas of the county (that outside the city limits of Vicksburg) on a road-mileage-bridge-maintenance basis and, *taking the population and racial characteristics of these five areas as given,* undertook the tedious task of drawing lines into the city in a manner which would produce a plan complying with Fourteenth Amendment

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tain would be filed after preclearance. This expensive decision was, however, unnecessary under the approach taken by the Court below.

[9] Motion of the United States to Affirm 11.

[10] *Id.* at 12.

[11] *Id.*

[12] See Jurisdictional Statement 21-22. It is, of course, appellants' position that under *Beer* there is no requirement that shape be justified. The existence of other alternatives is also irrelevant.

standards [13] and this Court's mandate in *Beer*. Simply stated, the plan assumed its present characteristics as the result of purposeful, premeditated line drawing *by a professional* charged with the dual responsibility of drafting a plan complying with the Fourteenth Amendment and § 5 of the Voting Rights Act while—at the same time—meeting perceived governmental objectives with respect to equalization of maintenance responsibilities. The plan upgrades, and having responded affirmatively to *Beer*, Warren County's submission fits Mr. Justice Stewart's analysis in *UJO* with exactness:

> The clear purpose with which the New York legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act [as Warren County has with respect to the mandate of *Beer*]—forecloses any finding that it acted with an invidious purpose. . . .[14]

CONCLUSION

Although what this small, discrete jurisdiction and its elected representatives have undergone the past ten years in their dealings with the Voting Rights Section will never be adequately described, the massive litigation concerning Warren County redistricting has had and will continue to have devastating political consequences for the appellants and the community in gen-

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[13] If error was committed, *i.e.*, a step in the entire process which might have resulted in the drafting of a plan having differing characteristics, it was the retention of a planner with one-man-one-vote phobia. With the population in the neighborhood of 9,000 representing a median, the proposed districts contain populations of 9003, 9005, 8908, 9056 and 9009 respectively. See Jurisdictional Statement, Appendix A at 7a.

[14] United Jewish Org., Inc. v. Carey, 430 U.S. 144, 180 (1977) (Stewart, J., concurring).

eral. Now rewarded with court-ordered elections and the beneficiary of two 65% districts (with one entirely within the city limits of Vicksburg) appellants seek vindication of their position that *no minority group* has a statutory or constitutional right to elect officials "in proportion to their voting potential." [15] Ultimately, of course, appellants contend that if § 5 is to function as intended by Congress the message must be conveyed in *unmistakable language* that so long as "upgrading" occurs in the *Beer* sense it is for elected officials, not the Department of Justice or a § 5 court, to determine what percentage figures are necessary "to ensure the opportunity for the election of minority representatives." [16] The game is worth the candle. Warren County and its now court-imposed 65% districts are but a prelude to what every covered jurisdiction in the United States can expect if the lower court decision stands.

Respectfully submitted,

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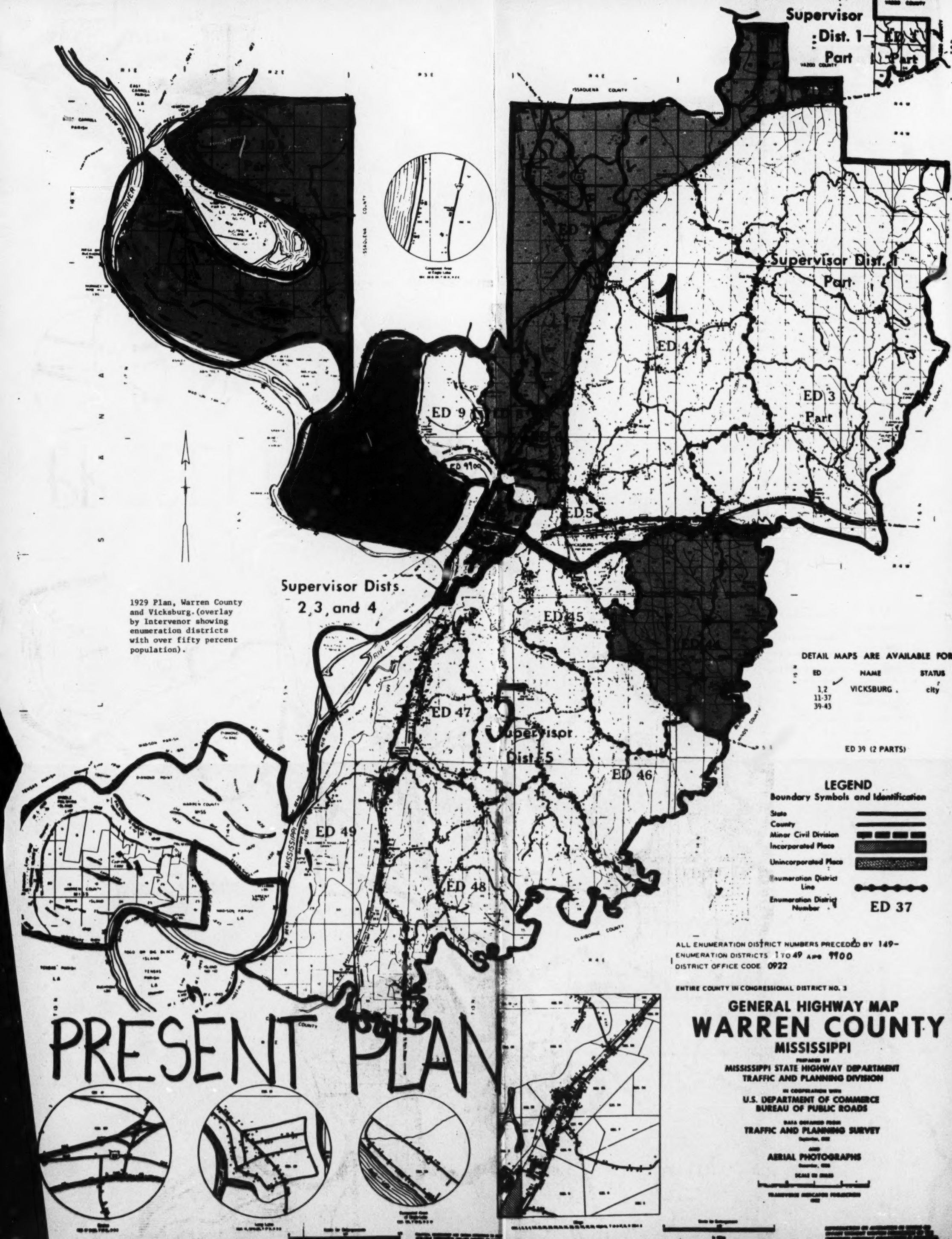
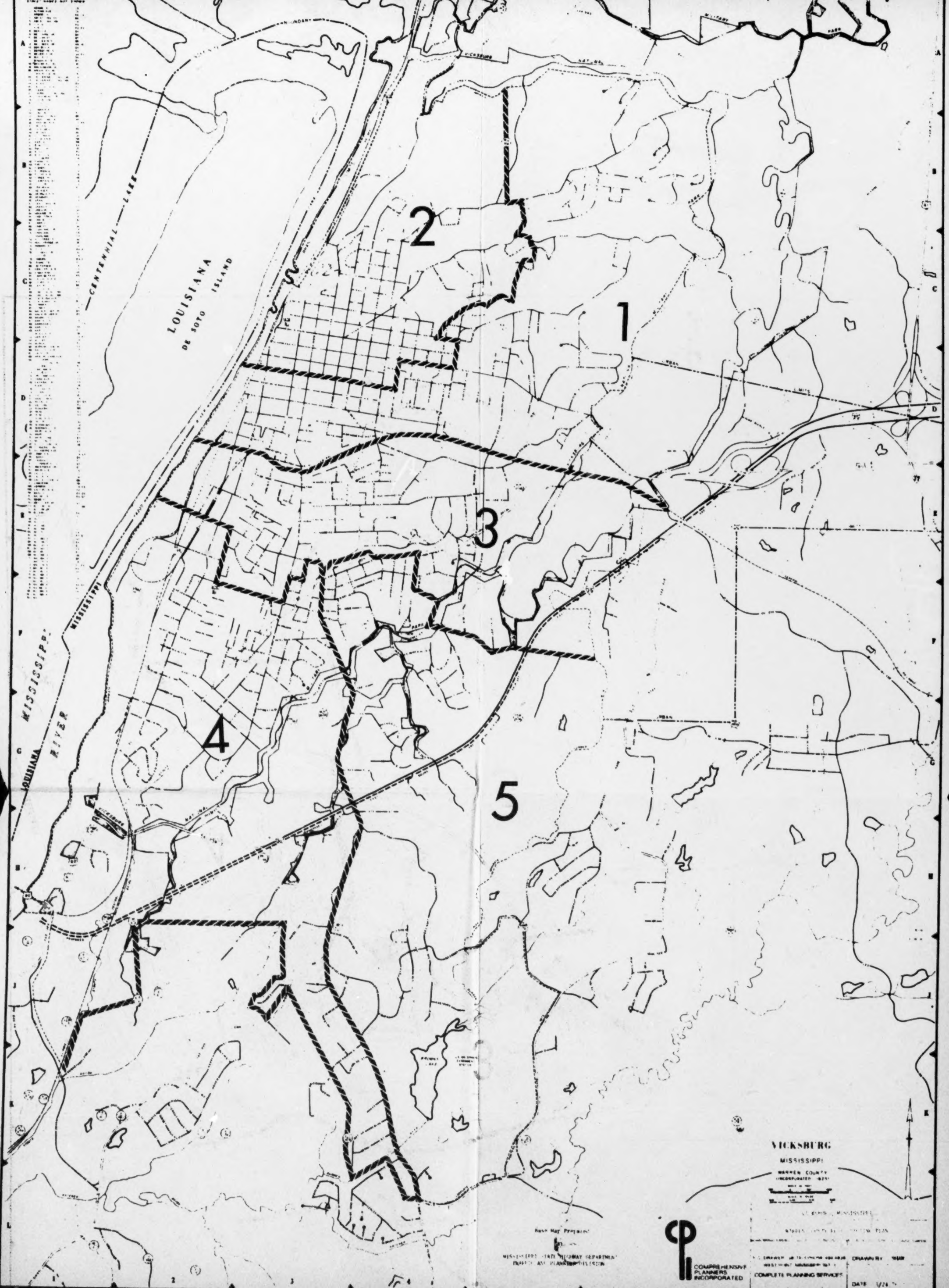
[15] Beer v. United States, 425 U.S. 130, 136 n.8 (1976). With 41% of the population, the lower court's requirement of two 65% districts out of five is a mandate of proportional representation.

[16] United Jewish Org., Inc. v. Carey, 420 U.S. 144, 162 (1977).

PRESENT PLAN



1929 Plan, Warren County and Vicksburg. (overlay by Intervenor showing enumeration districts with over fifty percent population).


LOUISIANA
DE SOTO ISLAND
CENTENNIAL
LAKE
MISSISSIPPI
RIVER
1
2
3
4
5
VICKSBURG
MISSISSIPPI
WARREN COUNTY
COMPREHENSIVE PLANNERS INCORPORATED
COMPLETE PLANNING SERVICES

Supervisor Dist. 1 Part

ED 3 Part

ED 10 Part

ED 9

ED 9100

ED 5

ED 7

ED 4

Supervisor Dist. 1 Part

Supervisor Dists. 2, 3, and 4

ED 45

ED 47

Supervisor Dist. 5

ED 46

ED 49

ED 48

DETAIL MAPS ARE AVAILABLE FOR:

ED	NAME	STATUS
1,2 11-37 39-43	VICKSBURG	city

ED 39 (2 PARTS)

LEGEND

Boundary Symbols and Identification

- State
- County
- Minor Civil Division
- Incorporated Place
- Unincorporated Place
- Enumeration District Line
- Enumeration District Number — ED 37

ALL ENUMERATION DISTRICT NUMBERS PRECEDED BY 149-
ENUMERATION DISTRICTS 1 TO 49 AND 9100
DISTRICT OFFICE CODE 0922

ENTIRE COUNTY IN CONGRESSIONAL DISTRICT NO. 3

GENERAL HIGHWAY MAP
WARREN COUNTY
MISSISSIPPI

PREPARED BY
MISSISSIPPI STATE HIGHWAY DEPARTMENT
TRAFFIC AND PLANNING DIVISION

IN COOPERATION WITH
U.S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS

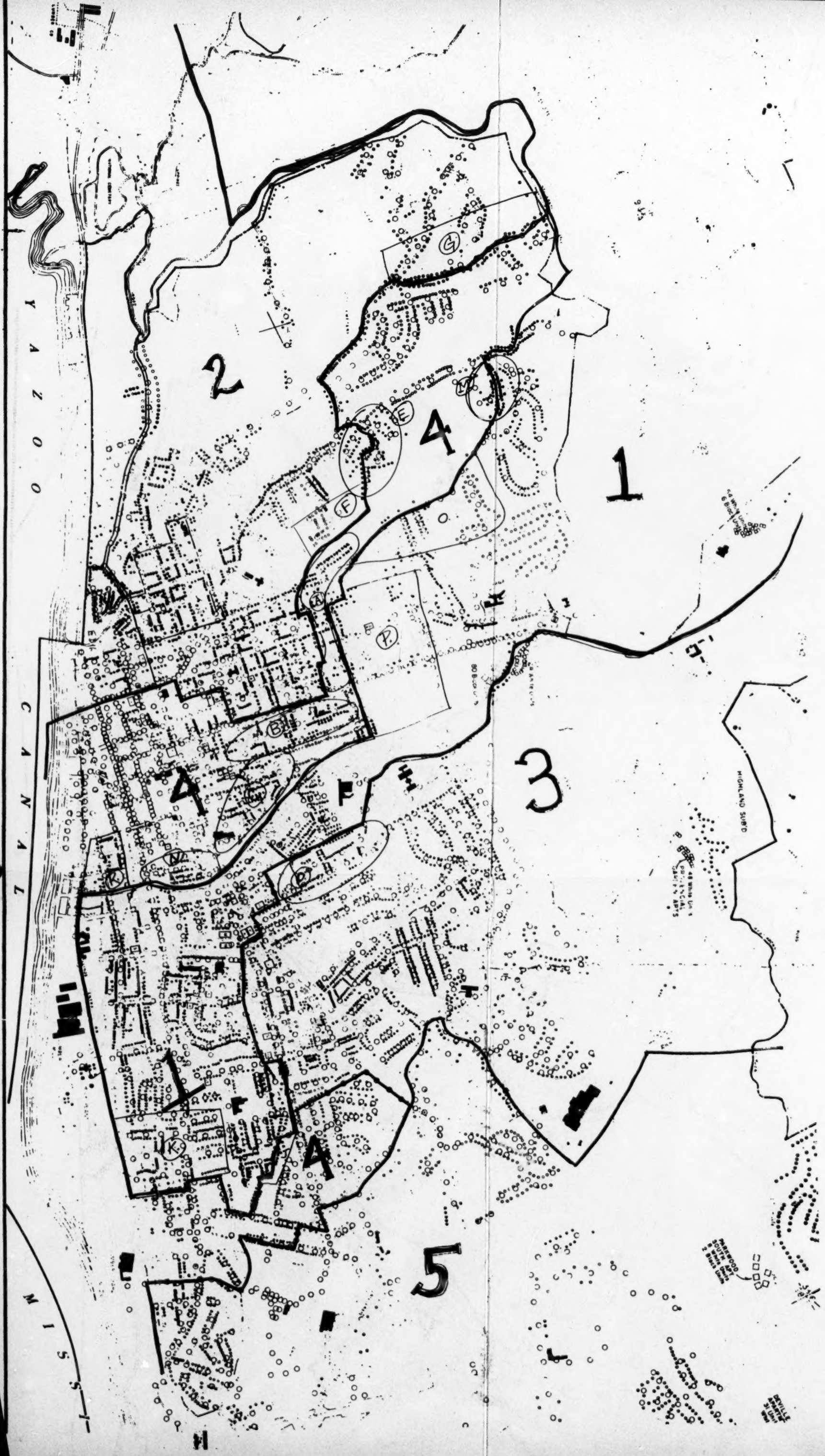
DATA OBTAINED FROM
TRAFFIC AND PLANNING SURVEY
[illegible], 1960

AND
AERIAL PHOTOGRAPHS
[illegible], 1960

SCALE IN MILES

TRANSVERSE MERCATOR PROJECTION
1960

Proposed plan, Warren County and Vicksburg. (overlay by Intervenors showing enumeration districts with over fifty percent black population).


YAZOO
CANAL
MISSISSIPPI
2
4
1
3
4
5
4
G
M
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B
N
D
K
HIGHLAND SUBD
DEVILLE APARTMENTS